

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Mike and Katie Schmid,
Complainants,
v.

NOTICE OF DETERMINATION
OF PROBABLE CAUSE

AND

Sheriff Brad Gerhardt, Sheriff, Martin
County Sheriff's Department,
Respondents.

ORDER FOR PREHEARING
CONFERENCE AND
EVIDENTIARY HEARING

TO: The Parties

On October 4, 2010, Mike and Katie Schmid (Complainants) filed a Complaint with the Office of Administrative Hearings. The Schmids alleged that Sheriff Brad Gerhardt and the Martin County Sheriff's Department (the County) violated the Minnesota Government Data Practices Act by denying Complainants the opportunity to listen to, or obtain a copy of, an audio recording of a 911 call made on May 30, 2010. Respondents filed an initial response to the Complaint on October 25, 2010.

Patricia E. Kuderer, Rossi, Cox, Vucinovich, Flaskamp, P.C. appeared on behalf of Complainants Mike and Katie Schmid. Terry W. Viesselman, Martin County Attorney, appeared on behalf of Respondents Brad Gerhardt and the Martin County Sheriff's Department.

After reviewing the Complaint and the County's Response to the Complaint, the Administrative Law Judge has determined that the Complaint presents sufficient facts to believe that violations of Chapter 13 have occurred. Specifically, the Administrative Law Judge concludes that there is probable cause to believe that the County violated Minnesota Statute §§ 13.03 and 13.05, subd. 4(d) by denying the Schmids the opportunity to listen to, or obtain a copy of, an audio recording of a 911 call made on May 30, 2010.

Based upon the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED and NOTICE IS GIVEN THAT:

1. This matter has been assigned to Administrative Law Judge Eric L. Lipman for an evidentiary hearing. The address of the Administrative Law Judge is 600 North Robert Street, P.O. Box 64620, St. Paul, Minnesota 55164-0620. The Administrative Law Judge may be reached at telephone number 651-361-7842 and the Office's fax number is 651-361-7936.

2. This matter will be scheduled for a prehearing conference to be held by telephone conference call and a later evidentiary hearing to be held at the Office of Administrative Hearings at 600 North Robert Street in St. Paul. The dates and times of the Pre-Hearing Conference and the evidentiary hearing will be sent to the parties under a separate cover.

Dated: November 10, 2010

/s/ Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Factual Background

The Schmids allege that the County violated various provisions of the Minnesota Government Data Practices Act when they refused to provide a copy of an audio recording of a 911 call made by P.S., a third party, on May 30, 2009. P.S. had telephoned 911 to report reckless boating behavior on a local lake.

Martin County Sheriff's deputies who responded to the 911 call later arrested Mike Schmid and charged him with obstruction of legal process, fleeing in a motor vehicle, fleeing on foot and improper lights on a boat during night hours.¹

As part of the criminal proceedings against Mr. Schmid, County prosecutors disclosed materials relating to the 911 call to Mr. Schmid and his attorneys. Among the disclosures was detail as to the identity of the caller – P.S.²

On June 16, 2010, Complainant Katie Schmid requested to hear the recording of the 911 call made by P.S. The County refused to provide the recording, instead

¹ See, Exhibits 2 and 4 to Visselman Affidavit.

² Attachment to Expedited Data Practices Complaint, at 1 (Complaint) (Oct. 1, 2010).

providing the Schmids with a copy of the transcript of the 911 call which likewise included the caller's identity.³

The Schmids contacted P.S. and asked for a written authorization permitting the Schmids, the Schmid's attorney and Katie Schmid's father, access to the original 911 recording. P.S. signed an authorization which granted access to the recording "for purposes of listening to the tape or to obtain a copy of the tape."⁴

On July 26, 2010, the authorization was submitted to the County from the Schmids' attorney with a renewed request for access to the recording.⁵

In a letter dated July 29, 2010, the Martin County Attorney advised the Sheriff's Department to again refuse the Schmids' request, stating that the authorization was "deficient in that it fails to specifically state 'the purpose or purposes for which the information may be used . . . both at the time [of] the disclosure and at any time in the future'" The letter advised that disclosure of the materials should be made only if P.S. signed an authorization "which is in compliance with Minn. Stat. § 13.05, subd. 4(d)."⁶

In later submissions to the Administrative Law Judge, the County also asserted that that P.S.'s earlier authorization of disclosure to the Schmid's was orally withdrawn during a July 26, 2010 telephone conversation between P.S. and the County Attorney.⁷

Probable Cause Standard

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.⁸ If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.⁹ A judge's function in a probable cause determination does not extend to an assessment of the credibility of conflicting

³ See, Affidavit of Patricia Kuderer (Kuderer Aff.), Ex. 11.

⁴ Kuderer Aff., ¶ 7, Ex. 6, at. 2.

⁵ *Id.*, Kuderer Aff., ¶ 6, Ex. 5.

⁶ *Id.*, Kuderer Aff., ¶ 5, Ex. 4.

⁷ See, Visselman Affidavit, ¶ 6.

⁸ *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

⁹ *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

testimony; the task is simply to determine whether the facts available establish a reasonable belief that the County committed a violation.

Following a hearing on the merits, the Administrative Law Judge has the benefit of the record as a whole and is better positioned to assess credibility and the competing claims.

Analysis

The County makes three arguments in opposing disclosure of the recording: The recording is not “data on individuals;” the recordings are not ordinarily preserved for disclosure and the authorization signed by P.S. is deficient. None of these arguments is availing.

Minnesota Statutes Section 13.82, subd. 4 designates the audio recording of a 911 call “private data . . . with respect to the individual making the call” This statute is controlling as to the classification of the data.

The record retention practice of the Sheriff’s Department does not alter or influence the classification of the data under the MGDPA. As made clear in Minn. R. 1205.0200, subpart 4, “[t]he duration of the existence of data, including whether certain data is temporary rather than permanent, is not relevant to compliance with this chapter.” Thus, the fact that the 911 tapes may be routinely slated for erasure does not impact the classification or access to existing data.

Private data may generally be disclosed to another who is not the subject of the data, if the data subject gives informed consent to the release of the data.¹⁰

The rules of the Department of Administration determine “[w]hether a data subject has given informed consent”¹¹ Minnesota Rule 1205.1400, subp. 4.B requires:

All informed consents shall be given in writing. Prior to any signature being affixed to it by the data subject, such writing shall identify the consequence of the giving of informed consent.

In this case, the authorization from P.S. was in writing; bore her signature; and signaled her consent to the consequence of disclosure – namely that the Schmid’s, the Schmid’s attorney and Katie Schmid’s father could access to the original 911 recording “for purposes of listening to the tape or to obtain a copy of the tape.”¹²

¹⁰ Minn. Stat. § 13.05, subd. 4(d) (2009).

¹¹ *Id.*

¹² Kuderer Aff., ¶ 7, Ex. 6, at 2.

The County asserts that disclosure was not appropriate because the authorization did not meet the additional informed consent requirements of Minn. Stat. § 13.05, subd. 4a (6) – specifically the authorization was not “specific as to the purpose or purposes for which the information may be used . . . both at the time of the disclosure and at any time in the future” This argument is not availing. The additional requirement, obliging authorizations to detail the purposes for which the private data is sought, is required only when the informed consent is related to “insurance purposes.” The additional requirements of subdivision 4a do not apply (and are not a barrier to disclosure) in this instance because the Schmids’ request for government data is unrelated to the operation of an insurance program.

The Administrative Law Judge concludes that there is probable cause to believe that the consent provided by the Schmids to the County in late July, 2010, met the requirements of Minn. Stat. § 13.05, subd. 4(d) and Minn. R. 1205.1400, subp. 4.B. The Administrative Law Judge further concludes that there is probable cause to believe that the County’ failure to provide the Schmids with access to the 911 recording consistent with P.S.’s authorization violated the MGDPA.

Reserved for the evidentiary hearing is the question of whether P.S. later revoked her consent to the release of the 911 recording and whether that oral revocation was effective. These questions are best addressed after a hearing on the merits of the claim.

E. L. L.

PREHEARING CONFERENCE AND HEARING PROCEDURES

At the prehearing conference, preliminary matters will be addressed such as identifying the issues to be resolved, the number of potential witnesses and exhibits, the dates for filing exhibits and witness lists, and determining whether the matter may be disposed of without an evidentiary hearing.

The evidentiary hearing has been ordered and will be conducted pursuant to the authority granted to the Administrative Law Judge by Minn. Stat. § 13.085. Information about the evidentiary hearing and copies of governing state statutes and rules may be obtained online at www.oah.state.mn.us and at www.revisor.leg.state.mn.us. The Office of Administrative Hearings conducts proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota Supreme Court.

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence,

affidavits, documentation and argument for consideration by the Administrative Law Judge. The Administrative Law Judge must consider any evidence and argument submitted until a hearing record is closed, or may continue a hearing to enable the parties to submit additional testimony.

All hearings must be open to the public, except that the Administrative Law Judge may inspect *in camera* any government data in dispute. The Administrative Law Judge may conduct a closed hearing to consider information that is not public data, and may issue necessary protective orders and seal all or part of the hearing record, as provided in Minn. Stat. § 13.085, sub. 4 (c). The Administrative Law Judge may close any portion of the hearing as necessary to prevent disclosure of not public data which could be disclosed while a party is presenting its arguments.

COSTS AND FEES

The Complainant has paid a filing fee of \$1,000.00. If the Complainant substantially prevails in this matter, the Office of Administrative Hearings will retain \$50.00 of the filing fee, refund the balance to the Complainant and charge the Martin County Sheriff's Department and Sheriff Brad Gerhardt with the actual costs incurred by the Office of Administrative Hearings in conducting this matter, up to a maximum of \$1,000.00. In addition, if a Complainant substantially prevails, a rebuttable presumption exists that the complainant is entitled to an award of reasonable attorney fees, not to exceed \$5,000. This award may be denied if the Administrative Law Judge determines that the violation is merely technical or that there is a genuine uncertainty about the meaning of the governing law.

If the Complainant does not substantially prevail in this matter, the Complainant will receive a refund of the filing fee, less any costs incurred by the Office of Administrative Hearings in conducting this matter.

If the Administrative Law Judge determines that the complaint was frivolous or brought for the purposes of harassment, the Administrative Law Judge must order that the Complainant pay the Respondent's reasonable attorney fees, not to exceed \$5,000. The Complainant shall not be entitled to a refund of the filing fee.

BURDEN OF PROOF

The burden of proving the allegations in the complaint is on the Complainants. The standard of proof of a violation of chapter 13 is a preponderance of the evidence.

DISPOSITION OF COMPLAINT

At the conclusion of the evidentiary hearing, the Administrative Law Judge must determine whether the violation alleged in the complaint occurred and must make at least one of the following dispositions:

- (1) The Administrative Law Judge may dismiss the complaint.
- (2) The Administrative Law Judge may find that an act or failure to act constituted a violation of this chapter.
- (3) The Administrative Law Judge may issue a civil penalty against the Respondent of up to \$300.
- (4) The Administrative Law Judge may issue an order compelling the Respondent to comply with a provision of law that has been violated; and may establish a deadline for production of data, if necessary.
- (5) The Administrative Law Judge may refer the complaint to the appropriate prosecuting attorney for consideration of criminal charges.

The Administrative Law Judge must render a decision on the Complaint within ten business days after the hearing record closes. The Chief Administrative Law Judge shall provide for public dissemination of orders issued following a hearing. If the Administrative Law Judge determines that Respondent has violated a provision of law and issues an order to compel compliance, the Office of Administrative Hearings shall forward a copy of the order to the Commissioner of Administration. Any order issued pursuant to this process is enforceable through the district court for the district in which Respondent is located.

JUDICIAL REVIEW

A party aggrieved by a final decision on a complaint filed under section 13.085 is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69.

REASONABLE ACCOMMODATION

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Office of Administrative Hearings must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 600 North Robert Street, P.O. Box 64620, St. Paul, Minnesota 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TTY).